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THE RESPONSE OF THE UNITED STATES TO THE INTERNATIONAL CRIMINAL COURT:

REJECTION, RATIFICATION OR SOMETHING ELSE?

Joel F. England¹

INTRODUCTION

In July 1998, 120 nations joined together and signed the Rome Statute, setting in motion the creation of the International Criminal Court (ICC).² The Rome Statute emphasizes the necessity of establishing the ICC in order to end impunity for those committing the "most serious crimes of concern to the international community."³ Despite broad international support for the ICC, the United States did not support the Rome Statute and cited, as one of its chief objections, the potential vulnerability of American military personnel to the jurisdiction of the ICC.⁴ In recognition of concerns regarding the exertion of jurisdiction over United States forces stationed abroad, some members of the United States House of Representatives and Senate proposed a bill to "protect United States military personnel . . . against criminal prosecution by an international criminal court to which the United States is not a party."⁵

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² See Rome Statute of the International Criminal Court, July 17, 1998, UN. Doc. A/CONF. 183/9 [hereinafter Rome Statute].

³ *Id.* Preamble.

⁴ See David. J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

⁵ American Servicemembers' Protection Act, S. 2726, 106th Cong. (2000); See also American Servicemembers' Protection Act, H.R. 4654, 106th Cong. (2000).

More recently, on December 31, 2000, former United States President Bill Clinton instructed Ambassador David Scheffer to sign the Rome Statute, despite American reservations about the treaty.⁶ Clinton emphasized that signing the Rome Statute was necessary to allow the United States to remain in a position whereby the country could “influence the evolution of the court.”⁷ Yet, the former President made clear that American reservations remained. He stated that the ICC should exercise jurisdiction over United States personnel only upon ratification of the Rome Statute and indicated that the United States should have the opportunity to “observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction.”⁸

This Note will examine American objections to the establishment of the ICC as currently contemplated and criticisms of the American position. In addition, it will consider the appropriateness of the proposed Congressional response, embodied in the American Servicemembers’ Protection Act. Part I will briefly review the road leading up to the Rome Statute and some of the key elements of the Statute. Part II will consider the validity of both American objections to the Rome Statute and critiques of the American stance. Part III will analyze American concerns by examining instances in which American servicemembers could be vulnerable to the jurisdiction of the ICC. Part IV will argue that, while the United States must strive to protect its military members, the proposed American Servicemembers’ Protection Act is not an appropriate response.

⁶Associated Press, *Clinton’s Words: ‘The Right Action’*, The New York Times. January 1, 2001, at A6.

⁷*Id.*

I. Brief History of the ICC and Key Elements of the Rome Statute

Nations created the ICC in response to the numerous atrocities that the world had witnessed in the 20th century.⁹ The justification for establishing a permanent international criminal body is an outgrowth of previous attempts to bring perpetrators of serious international crimes to justice. The notion of creating a body to hold individuals accountable for international crimes originated in the establishment of the Nuremberg Tribunal following World War II.¹⁰ The Nuremberg Tribunal's charter provided for the prosecution of individuals for crimes against peace, war crimes, and crimes against humanity.¹¹ However, the dynamics of the Cold War prevented the world community from building on the Nuremberg experience, and the international community failed to act in response to large-scale atrocities in places such as Cambodia, Argentina, Chile, East Timor, Uganda, and Iraq.¹² Recently, less encumbered by Cold War politics, the United Nations Security Council established international

⁸*Id.*

⁹See Rome Statute, *supra* note 2, Preamble (stating "Mindful that during this century millions of children, women, and men have been victim of unimaginable atrocities that deeply shock the conscience of humanity...").

¹⁰See Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 346 (1999).

¹¹See Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, The Government of the United States of America, The Provisional Government of the French Republic, and the Government of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, Mar. 15, 1951, 82 U.N.T.S. 279 (1945).

¹²Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on International Operations of the Comm. on Foreign Relations United States Senate, 105th Cong. 72 (1998) (statement of Michael P Scharf Professor of Law, and Director, Center for International Law and Policy, New England School of Law) [hereinafter *Senate Subcommittee Hearings*].

tribunals to address atrocities committed in former Yugoslavia and Rwanda.¹³ The process of creating such ad hoc tribunals proved to be a formidable challenge, requiring agreement as to the scope of tribunal authority, staffing decisions, and financing.¹⁴ This experience gave credence to the creation of a permanent court that could respond more quickly and efficiently to international crimes.¹⁵ Furthermore, many perceived a permanent court as an answer to one of the chief criticisms of the ad hoc approach: the propensity for selective justice.¹⁶

A brief overview of some of the key elements of the Rome Statute is necessary before addressing the American objections to the Statute. The Rome Statute establishes jurisdiction over four different categories of crimes: genocide, crimes against humanity, war crimes, and aggression.¹⁷ Genocide includes “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group”¹⁸ Encompassed in the definition of crimes against humanity are acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”¹⁹ For the ICC to have jurisdiction over war crimes, such crimes must be “part of a plan or policy or [] part of a large-scale commission of such crimes.”²⁰ While the crime of aggression is included, jurisdiction over this crime awaits future agreement over its definition.²¹

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.* at 45 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

¹⁶ *See David, supra* note 10, at 347.

¹⁷ *See Rome Statute, supra* note 2, Art. 5(1).

¹⁸ *Id.* Art. 6.

¹⁹ *Id.* Art. 7.

²⁰ *Id.* Art. 8.

²¹ *Id.* Art. 5(2).

Furthermore, the Rome Statute sets forth multiple ways in which the ICC can exert jurisdiction over individuals. Absent a Security Council referral, the ICC can exercise jurisdiction over a citizen of a State Party or over an individual who participated in the alleged crime in the territory of a State Party.²² Additionally, a nonparty can consent to ICC jurisdiction with respect to a particular crime.²³ Finally, the ICC has “jurisdiction *ratione temporis*,” that is, the ICC may exert jurisdiction over crimes committed only after the Statute enters into force.²⁴ The Statute provides three avenues for cases to come before the ICC: (1) a State party can refer a case to the prosecutor; (2) the United Nations Security Council can refer a case to the prosecutor; or (3) the prosecutor can initiate an investigation.²⁵

The Rome Statute will enter into force 60 days after 60 countries have ratified the agreement.²⁶ Currently, 37 countries have ratified the Rome Statute and 139 countries are signatories.²⁷

II. American Objections to the Rome Statute

Upon his return from the negotiations, Ambassador David Scheffer acknowledged in his congressional report that, although the Rome Statute met many of the United States objectives, failure of the American delegation

²² *See id.* Art. 12

²³ *See id.* Art. 12(3).

²⁴ *Id.* Art. 11.

²⁵ *See id.* Art. 13.

²⁶ *See id.* Art. 126.

²⁷ *Coalition for an International Criminal Court* (last modified Jul. 17, 2001) <<http://www.iccnw.org/>>.

to achieve certain critical objectives was likely to preclude American support.²⁸ The United States chief concern is the potential vulnerability of American military members to ICC jurisdiction. As Ambassador Scheffer explains:

It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security . . . to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize.²⁹

Underlying American concern, as is often the case with international law, is the issue of sovereignty and how much of it should be relinquished. As former Secretary of Defense Caspar Weinberger stated before Congress with respect to the ICC, "The whole concept really tests whether the idea of sovereignty exists any longer. And it is a very major step along the road toward wiping out individual national sovereignty."³⁰

Therefore, United States officials are apprehensive that American participation in the ICC would impinge on national sovereignty and potentially allow the ICC to try United States servicemembers and government officials. This concern is directed at four specific issues: the ICC's jurisdictional regime, the lack of a 10-year opt-out provision, the amount of prosecutorial discretion, and the inclusion of the crime of aggression.³¹

²⁸ *Senate Subcommittee Hearings*, *supra* note 12 (statement of David J. Scheffer, Ambassador-At-Large For War Crimes Issues).

²⁹ Scheffer, *supra* note 4, at 18.

³⁰ *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution Hearing Before the Comm. on Foreign Relations United States Senate*, 106th Cong. 4 (2000) (statement of Caspar Weinberger, Former Secretary of Defense; and chief executive officer, Forbes, Inc). [hereinafter *Senate Foreign Relations Hearings*].

³¹ See Scheffer, *supra* note 3, at 17-21.

A. Jurisdictional Issues

First, American dissatisfaction with the Rome Statute's jurisdictional framework begins with the claim that the Statute is contrary to international treaty law in allowing the ICC to exercise jurisdiction over nationals of nonparty states.³² To reiterate, the Statute allows the ICC to exert jurisdiction over an individual who commits a crime in the territory of a state party.³³ Therefore, a military member serving in a peacekeeping operation in a foreign country that is party to the treaty would be subject to ICC jurisdiction despite the United States nonparty status.³⁴ Originally, a statutory provision allowing ad hoc consent of nonparty states to ICC jurisdiction exacerbated American concerns.³⁵ Under this provision, ICC jurisdiction could apply to an American servicemember who allegedly committed a crime in a foreign country that had consented to jurisdiction—even if the foreign country and the United States were not parties to the Statute.³⁶

The following hypothetical illustrates the suspect nature of this provision: Saddam Hussein could invoke the jurisdiction of the ICC for crimes committed by Americans operating in Iraq, while the ICC would be unable to take action against Hussein for atrocities committed against the Iraqi people.³⁷ Rule 44(2) of the Rules of Procedure and Evidence appears to address the concern over ad hoc consent to ICC jurisdiction.³⁸ Rule 44(2) requires that any

³² See *id.* at 18.

³³ See Rome Statute, *supra* note 1, Art. 12.

³⁴ See Scheffer, *supra* note 4, at 18.

³⁵ See Scheffer, *supra* note 4, at 18; See also Rome Statute, *supra* note 1, Art. 12(3).

³⁶ See Scheffer, *supra* note 4, at 18.

³⁷ See David, *supra* note 10, at 369.

³⁸ David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, at 8 (2001).

nonparty that consents to ad hoc ICC jurisdiction under Article 12(3) also must accept ICC jurisdiction over crimes covered in the Rome Statute that are relevant to the entire situation.³⁹ This provision will likely ensure that a nonparty considers a particular conflict carefully before invoking the jurisdiction of the ICC. Additionally, it will likely prevent countries from abusing Article 12(3).

Notwithstanding this remedy, the United States continues to argue that state participation in the ICC does not stem from customary international law, but as a product of treaty law.⁴⁰ Therefore, despite recognition that many crimes within the ICC's jurisdiction reflect customary international law, state participation requires consent. For the United States, the only exception to consent is Security Council action under the United Nations Charter.⁴¹

Critics of the American position suggest that the United States has misconstrued the Rome Statute. They indicate that the exercise of jurisdiction over American nationals does not equate to binding the United States as a party; unlike a State Party, the United States is not obligated to assist in the prosecution.⁴² Marcella David, an associate professor at the University of Iowa College of Law, maintains that the Rome Statute's assertion of jurisdiction over crimes "is consistent with long-settled principles of universal jurisdiction and with state jurisdiction

³⁹ See *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add. 1 (2000).

⁴⁰ See David, *supra* note 10, at 369.

⁴¹ See *Senate Subcommittee Hearings*, *supra* note 12 (statement of David J. Scheffer, Ambassador-At-Large For War Crimes Issues).

⁴² See David, *supra* note 10, at 369.

over crimes committed within its territory or against its nationals. The only true innovation provided by the Statute is the ability of a State exercising jurisdiction to refer the matter to the ICC for prosecution.”⁴³

In essence, the question is whether a state can assign its right to prosecute an individual to an international body. Critics of the American position suggest that the universal jurisdiction and customary international law provide an answer. They cite to the International Military Tribunal at Nuremberg as an example where states joined together and exercised jurisdiction over crimes of customary international law.⁴⁴ Jordan Paust, professor at the University of Houston Law Center, asserts that the Nuremberg Tribunal could have resulted without German consent and that the tribunal prosecuted Germans even though the perpetrators did not commit crimes in the territory of the parties that established the tribunal.⁴⁵ Just as countries could join together and prosecute customary international law crimes at Nuremberg, they also can join together to prosecute similar crimes in the ICC.⁴⁶

Of course, the success of the preceding argument depends to some extent on agreement as to whether the crimes under ICC jurisdiction are consistent with customary international law. Ambassador Scheffer has suggested that the crimes contained in the Rome Statute go beyond customary international law.⁴⁷ Additionally, the United States is concerned with the extent to which the Statute’s amendment process will allow new crimes to become part

⁴³ *Id.* at 369-370.

⁴⁴ See Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1, 3 (2000).

⁴⁵ See *id.* at 4.

⁴⁶ See *id.*

⁴⁷ See Scheffer, *supra* note 4, at 18.

of customary international law and subject nonparty states to ICC jurisdiction, despite allowing state parties to immunize their citizens from prosecution for the new crimes.⁴⁸

Critics of the American opposition to the Rome Statute also rely on the principle of complementarity. The Rome Statute provides that the jurisdiction of the ICC “shall be complementary to national criminal jurisdictions”⁴⁹ The Statute defers to national jurisdictions by rendering inadmissible before the ICC cases that a State with jurisdiction investigates or prosecutes.⁵⁰ Under the Statute, the ICC would step in only when “a State is unwilling or unable genuinely to carry out the investigation or prosecution”⁵¹ However, the United States finds this safeguard inadequate. The reason is that it provides little comfort in those situations where the United States feels it is carrying out a justified policy, such as a peacekeeping operation, and is unlikely to initiate prosecution against its personnel for participating.⁵²

Before moving on to the United States second objection to the Rome Statute, it is important to understand why the United States is so concerned with the status of nonparties. Critics suggest the United States could resolve many of its difficulties with the Rome Statute by simply joining.⁵³ As indicated above, the United States objects to the jurisdictional scheme of the Rome Statute as a matter of “fundamental treaty law.”⁵⁴ But perhaps more practically, even if the executive branch supported the treaty, American ratification would be a lengthy process,

⁴⁸ See *id.* at 20; See also Rome Statute, *supra* note 2, Art. 121(5).

⁴⁹ Rome Statute, *supra* note 2, Preamble.

⁵⁰ See *id.* Art. 17(a).

⁵¹ *Id.*

⁵² See Scheffer, *supra* note 4, at 19.

⁵³ See *id.* at 18.

extending beyond the date the treaty enters into force.⁵⁵ Hence, the United States could experience nonparty status for some time and could be bound by the treaty's provisions long before the treaty is ratified.⁵⁶

B. Opt-Out Provision

In addition to jurisdictional issues, the United States cites the lack of a 10-year opt-out provision for crimes against humanity and war crimes as another reason the Statute is unacceptable.⁵⁷ This objection represents a general policy concern over the unknown—how fair and effective the ICC will be in practice. The 10-year opt-out provision the United States advocates would allow state parties to opt out of ICC jurisdiction over crimes against humanity and war crimes during a 10-year period.⁵⁸ The provision would also “shield nonparty states from the [C]ourt’s jurisdiction unless the Security Council were to decide otherwise.”⁵⁹ Additionally, those nations that opt out of ICC jurisdiction would not be allowed to bring cases before the ICC regarding the crimes to which the nation opted out.⁶⁰ The underlying rationale of such an opt-out provision is to provide states with the “opportunity to assess the effectiveness and impartiality of the court before considering whether to accept its jurisdiction.”⁶¹ The 10-year opt-out provision was not included in the Rome Statute; however, a seven-year opt-out provision for war crimes is

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 19.

⁵⁸ *See id.*

⁵⁹ *Id.* at 19-20.

⁶⁰ *See id.* at 19.

⁶¹ *Senate Subcommittee Hearings, supra* note 12 (statement of David J. Scheffer, Ambassador-At-Large For War Crimes Issues).

provided.⁶² The United States' criticism that the seven-year opt-out provision will create an asymmetrical result is similar to the concern with ICC jurisdiction over nonparties. In effect, a state party that commits war crimes could be immune from prosecution under the opt-out provision, while a nonparty would be subject to the ICC's jurisdictional reach.⁶³

Commentators suggest that American criticism of the seven-year opt-out provision is inconsistent in light of the American support of a 10-year opt-out provision.⁶⁴ However, the United States' position may not necessarily be inconsistent. The United States probably would have supported the seven-year provision if the provision had accorded nonparty states immunity from prosecution, except in cases of Security Council action. American discontent is premised on the "political inequity of one state finding another's nationals culpable when the actions of its own nationals go unchallenged."⁶⁵ Professor David suggests that the real question is not whether the provision's coercive tenor is objectionable but whether the advantages of the provision in facilitating increased participation outweigh the potential for unfairness.⁶⁶

⁶² See Rome Statute, *supra* note 2, Art. 124.

⁶³ *Senate Subcommittee Hearings*, *supra* note 12 (statement of David J. Scheffer, Ambassador-At-Large For War Crimes Issues).

⁶⁴ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 451 (2000).

⁶⁵ David, *supra* note 10, at 372.

C. Independent Prosecutor

The United States' third criticism of the Rome Statute results from the discretion it gives to the prosecutor. The Rome Statute allows the prosecutor to initiate an action on the prosecutor's own accord.⁶⁷ The prosecutor may proceed with such an investigation upon the approval of the Pre-Trial Chamber of the ICC.⁶⁸ Due to the three-judge make-up of the Pre-Trial Chamber, the agreement of two judges would allow the case to go forward.⁶⁹ The United States fears that the discretion granted to the prosecutor raises the potential for illegitimate or frivolous political prosecutions.⁷⁰

ICC supporters indicate that the Rome Statute provides adequate checks on the prosecutor, rendering American suspicion of prosecutorial discretion unfounded.⁷¹ They assert that the requisite Pre-Trial Chamber approval prior to judicial advancement is a sufficient safeguard.⁷² Additionally, prosecutorial authority is limited in that the Statute calls for jurisdiction over only "the most serious crimes of concern to the international community."⁷³

⁶⁶ *See id.*

⁶⁷ *See Rome Statute, supra note 2, Art. 15(1).*

⁶⁸ *See id.* at Art. 15(4).

⁶⁹ *Senate Subcommittee Hearings, supra note 12* (statement of David J. Scheffer, Ambassador-At-Large For War Crimes Issues).

⁷⁰ *See id.*

⁷¹ Batram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 880 (1999).

⁷² *See id.* at 880-881.

⁷³ Rome Statute, *supra note 2*, Preamble.

D. Inclusion of Crime of Aggression

The final American objection to the Rome Statute is its inclusion of the crime of aggression.⁷⁴ The Rome Statute includes “aggression,” once it is defined, as one of the crimes over which ICC has jurisdiction.⁷⁵ An amendment to the Rome Statute seven years after it takes force will provide a definition of “aggression.”⁷⁶ The current lack of consensus among delegates to the Rome Conference in developing a definition for “aggression” is indicative of the difficulty of defining the term objectively. The United States has expressed concern that an overly broad definition could infringe on a nation’s legitimate use of military force.⁷⁷ The United States maintains that a direct link must exist between the Security Council’s decision that an act of aggression has occurred and the ICC’s ability to prosecute an individual for aggression.⁷⁸

Critics of the United States position suggest that its concern with the definition of “aggression” provides an impetus for joining the treaty. As previously stated, the crime of aggression will become part of the Rome Statute only through the ICC’s amendment process.⁷⁹ Some commentators contend that the United States should become a party to the Rome Statute in order to exercise influence over how the crime of aggression is defined.⁸⁰ If the United

⁷⁴ See Scheffer, *supra* note 4, at 21.

⁷⁵ See Rome Statute, *supra* note 2, Art. 5.

⁷⁶ See *id.* Art. 121.

⁷⁷ See Scheffer, *supra* note 4, at 21.

⁷⁸ See *id.*

⁷⁹ See Rome Statute, *supra* note 2, Art. 5 & Art. 121.

⁸⁰ See Brown, *supra* note 68, at 868.

past United States military actions and considers hypothetical situations where state parties might try to initiate action against American personnel in the ICC. This section will focus specifically on the past operations in Sudan and Kosovo.

A. American Attack on Sudanese Pharmaceutical Plant

On August 20, 1998, the United States struck a pharmaceutical plant in Khartoum, Sudan as part of a response to terrorist bombings of American embassies in Africa and as a preventive measure against future terrorist attacks.⁸⁶ The United States justified the attack to the Security Council under Article 51 of the United Nations Charter, which allows a state fearing imminent attack to act in self-defense.⁸⁷ The plant was purportedly producing chemical agent precursors in support of terrorist activities.⁸⁸ Sudan has continued to question the legitimacy of the American attack, and in July 2000, the owner of the plant, Salah Idris, filed an action against the United States in the U.S Court of Claims for resulting damages.⁸⁹

Suppose that Sudan is a state party to the ICC and has referred the United States bombing of the Sudan plant to the ICC prosecutor, alleging crimes against humanity, war crimes, and the crime of aggression. Preliminarily, the prosecutor must address the question of jurisdiction. Since the hypothetical considers Sudan a party to the Rome Statute and the alleged crime occurred in Sudan, the ICC could exercise jurisdiction under

⁸⁶ See Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, THE WASHINGTON POST, August 21, 1998, at A01.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See Vernon Loeb, *Review of Sudan Attack Sought; Bill Asks Court to Study U.S. Bombing of Plant, Possible Redress*, THE WASHINGTON POST, September 27, 2000, at A05.

States were a party and disagreed with the elements of the definition, it could prevent the amendment from entering into force by convincing over one-eighth of the state parties of its position.⁸¹

Additionally, the language in the Rome Statute pertaining to the crime of aggression states that the “provision shall be consistent with the relevant provisions of the Charter of the United Nations.”⁸² Some suggest that this language indicates that the Rome Statute allows the United Nations Security Council to make a prior determination of aggression, thereby rendering the American objection regarding aggression invalid.⁸³ In contrast, other critics of the American position argue that the determination of aggression for purposes of the Rome Statute should remain independent of the politics of the Security Council.⁸⁴ They suggest that a provision requiring a prior determination of aggression by the Security Council would undermine the authority of the ICC by allowing nations that are subject to the law (Permanent Five) to exercise final judgment as to whether they would actually be held accountable under the law.⁸⁵

III. EXAMPLES AND ANALYSIS

A greater understanding of the United States objections to the Rome Statute will likely emerge within a more specific context of American concerns. The potential vulnerability of American servicemembers operating abroad is difficult to appreciate when considering the objections in the abstract. Therefore, this section examines

⁸¹ See Rome Statute, *supra* note 2, Art. 121(4).

⁸² *Id.* at Art. 5(2).

⁸³ See Gerard E. O'Connor, Note, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 972 (1999).

⁸⁴ See Sadat & Carden, *supra* note 64, at 443.

⁸⁵ See *id.*

Articles 12 and 13 of the Rome Statute.⁹⁰ Because the United States believed it was fully justified in the attack, it conducted no investigation into the matter; therefore, the complementarity principle of the Rome Statute would provide no protection.⁹¹ Hence, if the alleged crime was of “sufficient gravity,”⁹² the prosecutor would consider whether there was a reasonable basis to proceed with an investigation.⁹³ In determining whether to proceed, the prosecutor would have to assess whether the facts support a reasonable belief that the accused committed a crime that falls within the scope of ICC jurisdiction.⁹⁴

The first hypothetical Sudanese allegation is that the United States committed a crime against humanity. Most likely, the initial question the ICC would have to decide would be whether the American action constituted a “widespread or systematic attack” directed against a civilian population.⁹⁵ In order to amount to a crime against humanity under the Rome Statute, the attack directed against a civilian population must include the “multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such an attack. . . .”⁹⁶ The American attack on the Sudanese plant consisted of a barrage of tomahawk missile strikes during one night that resulted in the death of one and injury to nine others.⁹⁷ This fairly isolated attack probably would not rise to the level of repeated actions necessary to make out a *prima facie* case for a crime against humanity. However, this

⁹⁰ See Rome Statute, *supra* note 2, Art. 12 & Art. 13.

⁹¹ See *id.* at Art. 17(1).

⁹² *Id.*

⁹³ See *id.* at Art. 53.

⁹⁴ *Id.*

⁹⁵ *Id.* at Art. 7.

⁹⁶ *Id.*

⁹⁷ See *World in Brief*, THE WASHINGTON POST, August 21, 2000, at A16.

perception would depend on the lens through which ICC judges consider the attack. Perhaps the judges would conclude that launching several tomahawk missiles in one day was enough to constitute a crime against humanity. Even so, the relatively few resulting casualties would likely mitigate against the successful prosecution of a crime against humanity charge. In other words, the small number of casualties would support the argument that the attack was not directed against the civilian population.

The second hypothetical Sudanese allegation is that the United States committed a war crime. Under the Rome Statute, the ICC has jurisdiction over a war crime when the crime is committed “as part of a plan or policy or as part of a large-scale commission of such crimes.”⁹⁸ Sudan would likely challenge the American action as an intentional attack “against the civilian population,” or it would accuse the United States of “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damages to civilian objects. . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. . . .”⁹⁹ A threshold question in this case is whether the American strike against the Sudanese chemical plant fell in the category of an international armed conflict. Some commentators have suggested that such an attack would not be in such a category.¹⁰⁰ That is, the absence of armed conflict between Sudan and the United States would preclude the application of Article 8 of the Rome Statute in this context.

⁹⁸ See Rome Statute, *supra* note 2, Art. 8(1).

⁹⁹ *Id.* at Art. 8(2)(b)(i) & (iv).

¹⁰⁰ See Sadat & Carden, *supra* note 64, at 434.

Furthermore, as part of its preliminary inquiry, the ICC would address whether the American action was conducted as “part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁰¹ Ambassador Sheffer touted this language as sufficiently setting a high threshold for war crimes.¹⁰² While, as some commentators have suggested, the requirement of a significant magnitude of such crimes seems to insulate individual soldiers from being hailed into court,¹⁰³ the disjunctive nature of the provision requires an inquiry into what the meanings of “plan or policy.” To the extent that most, if not all, military operations are conducted by execution of a plan, the provision would appear to have a much broader reach than those offenses carried out on a massive scale. Therefore, the actions of individual military personnel more likely would be open to ICC scrutiny. The attack of the Sudanese plant probably satisfies the requirement that the action be part of a plan.

Assuming that the situation did constitute international armed conflict and was part of a plan, the next question is whether American military members intentionally bombed civilians or whether the attack resulted in excessive collateral damage. The timing of the attack (nighttime), the relatively small number of casualties and injuries, and the admission of bombing the facility due to its production of chemical weapons mitigates against a finding that American personnel were intentionally targeting civilians. Even when civilian casualties result, the United States is free to invoke the defense of mistake, whereby officials can assert a reasonable basis for a lack of knowledge as to the civilian nature of a target.¹⁰⁴ However, the factually intensive nature of such an inquiry may

¹⁰¹ See Rome Statute, *supra* note 2, Art. 8(1).

¹⁰² See Scheffer, *supra* note 4, at 16.

¹⁰³ See O'Connor, *supra* note 83, at 964.

¹⁰⁴ See David, *supra* note 10, at 399; *see also* Rome Statute, *supra* note 2, at Art. 32.

inspire the ICC prosecutor to investigate the matter.¹⁰⁵ Sudan's charge concerning excessive collateral damage could present a stronger case before the ICC. The strength of the case would likely hinge on the ICC's standards of weighing the extent of collateral damage. The question here is not whether the United States knew some civilian casualties would result; the United States admitted such was the case when announcing that it timed the attack in an effort to minimize such casualties.¹⁰⁶ The language of the Rome Statute indicates collateral damage caused by the attack must be "clearly excessive."¹⁰⁷ Arguably, the language supports a finding of culpability only in cases of gross disproportionality. The United States would probably have a strong argument that the amount of casualties did not reach the requisite threshold. However, despite the relatively small number of casualties, the possibility for ICC inquiry into the matter increases due to questions surrounding the military necessity of striking the Sudanese plant in the first place.¹⁰⁸

The third and final hypothetical Sudanese allegation is that the United States had committed a crime of aggression. As previously discussed, while listed as a crime under the Rome Statute, the meaning of aggression was left undefined. Therefore, it will not come into force until parties agree upon a definition through the Rome Statute's amendment process.¹⁰⁹ Parties included three different definitions of the crime of aggression in the Draft

¹⁰⁵ See David, *supra* note 10, at 399.

¹⁰⁶ See Gellman & Priest, *supra* note 86, at A01.

¹⁰⁷ See Rome Statute, *supra* note 2, Art. 8(2)(b)(iv).

¹⁰⁸ See David, *supra* note 10, at 402.

¹⁰⁹ See Rome Statute, *supra* note 2, Art. 5(2).

Statute for the ICC.¹¹⁰ The hypothetical will be analyzed under the definition provided by Option Two, which is heavily influenced by the United Nations General Assembly Resolution 3314, Resolution on the Definition of Aggression.¹¹¹ Option Two requires the following for the crime of aggression:

[T]he crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.¹¹²

The level of control indicated in the language suggests that this crime may be reserved for high-level civilian and military officials. Option Two goes on to enumerate a list of acts that constitute aggression. Among those listed is the “bombardment by the armed forces of a State against the territory of another State.”¹¹³ The bombing of Sudan would fit into this category and therefore present a case against American personnel for aggression. As previously indicated, the United States had informed the United Nations that it was striking the Sudanese plant in self-defense, consistent with Article 51 of the United Nations Charter.¹¹⁴ Therefore, the ICC would have to consider whether the American action constituted a legitimate act of self-defense. Professor David suggests that because the American self-defense claim is not representative of a traditional notion of self-defense,

¹¹⁰ See Draft Statute of the International Criminal Court, April 14, 1998, UN. Doc. A/CONF. 183/2/Add.1 [hereinafter Draft Statute].

¹¹¹ See David, *supra* note 10, at 361.

¹¹² Draft Statute, *supra* note 110, Option 2(1).

¹¹³ *Id.* at Option 2(2)(b).

¹¹⁴ See Gellman & Priest, *supra* note 86, at A01.

and because the international community is relatively undecided about what constitutes appropriate preemption of terrorist attacks, the United States would likely face prosecution in the ICC.¹¹⁵ Indeed, the crime of aggression is an area where final determination often lies in the eye of the beholder. Considering the inherently controversial nature of determining whether a nation has committed aggression, it is easy to understand American concerns about ensuring that Security Council determinations are linked to ICC action in this area.

B. NATO Bombing of Kosovo

Next, this section will consider United States' operations in Kosovo in relation to the hypothetical charges against American personnel for committing crimes outlined in the Rome Statute. The province of Kosovo in the state of Serbia obtained autonomy in 1946.¹¹⁶ Former Serbian President Slobodan Milosevic revoked Kosovo's autonomy in 1989, citing risks to the Serb minority in the province.¹¹⁷ Subsequent oppression of the Kosovo Albanians resulted, and the Kosovo Liberation Army responded with independence movements and insurrection.¹¹⁸ The Serbian Government countered with military attacks, causing thousands of Kosovo Albanians to flee their homes.¹¹⁹ The United States, United Kingdom, France, Germany, Italy, and the Russian Federation brokered an agreement to promote Kosovo's autonomy in Serbia; however, Belgrade refused to accept the agreement and NATO

¹¹⁵ See David, *supra* note 10, at 393-394.

¹¹⁶ See Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 A.J.I.L. 828 (1999).

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 829.

¹¹⁹ See *id.*

forces began bombing targets in Serbia.¹²⁰ Former United States President Clinton cited the need to “avert a humanitarian catastrophe” as a basis for the military intervention.¹²¹

During the bombing campaign, targeting errors by American forces were brought to light. Such errors included the bombing of the Chinese Embassy in Belgrade and an Albanian refugee column in Kosovo.¹²² Additionally, critics questioned America’s decision to bomb dual-use facilities, such as factories, television stations, and electric power grids.¹²³

Suppose that Serbia has brought complaints against the United States in the ICC relating to the civilian casualties that resulted from the NATO bombing campaign. Specifically, Serbia has brought a challenge to the legality of the bombing of a Serbian television station. As in the hypothetical involving the bombing of the Sudanese chemical plant, the Serbian Government has alleged crimes against humanity, war crimes, and aggression in violation of the Rome Statute.

The analysis with regard to ICC jurisdiction and the hypothetical allegations is similar to the analysis in the Sudan example. The ICC would have jurisdiction over American personnel operating in Kosovo either if Serbia were a party to the Rome Statute or if the country agreed to submit to the jurisdiction of the ICC.¹²⁴

The critical factor in determining whether the United States had committed a crime against humanity as Serbia alleges in the hypothetical is the ICC’s interpretation of what comprises a “widespread or systematic attack

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See* Michael Dobbs, *A War-Torn Reporter Reflects*, THE WASHINGTON POST, July 11, 1999, at B01.

¹²³ *See id.*

directed against any civilian population.”¹²⁵ This language seems to contemplate a fairly high bar for ICC consideration as the Rome Statute states that such an attack involves “the multiple commission of acts. . . in furtherance of a State or organizational policy to commit such attack. . . .”¹²⁶ Arguably, this standard may protect the individual pilot who bombed the television station from being hailed into the ICC, since the pilot’s conduct could be considered a unitary act, not a widespread or systematic one. However, a decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides room for disagreement. In *Prosecutor v. Tadic*, the ICTY indicated that a “single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offenses to be held liable.”¹²⁷ Thus, despite the language of the Rome Statute, the *Tadic* decision leaves open the question of whether single acts by individuals could be considered crimes against humanity.

Additionally, unlike the bombing of the Sudanese plant, the Kosovo campaign involved numerous bombings carried out over several months. In this context, the protection for a military commander in charge of the operation is less clear. The ICC could consider such commander’s conduct in light of other similar bombings, and it is possible that the aggregate requirements set forth in the Rome Statute would be met. Therefore, the nature of the Kosovo conflict, as compared to the Sudanese bombing, provides for a greater likelihood that the ICC would prosecute a higher-level military commander.

¹²⁴ See Rome Statute, *supra* note 2, Art. 12 & Art. 13.

¹²⁵ See *id.* at Art. 7(1).

¹²⁶ See *id.* at Art. 7(2)(a).

¹²⁷ *Prosecutor v. Tadic*, No. IT-94-1-T, para. 649 (May 7, 1997).

With respect to Serbia's hypothetical allegation that the United States had committed war crimes, the Serbian Government could claim violations of the Rome Statute on a few grounds. Serbia could charge American personnel with "intentionally directing attacks against the civilian population. . . or against individual civilians not taking direct part in hostilities. . . ." ¹²⁸ Alternatively, Serbia could assert that American personnel were engaged in "intentionally directing attacks against civilian objects, that is, objects which are not military objectives. . . ." ¹²⁹ Finally, the Serbian Government could charge American servicemembers with knowingly attacking a target that would cause collateral damage to civilians or civilian objects, which is "clearly excessive in relation to the concrete and direct overall military advantage anticipated. . . ." ¹³⁰

All of these claims concern whether the United States attacked a legitimate military target and whether the attack satisfies the principle of proportionality. ¹³¹ The United States' position would argue that Serbian forces used the television station in support of military operations. Conversely, the Serbian Government would probably assert that the station was purely civilian and, even if used by the military for limited purposes, the attack was disproportionate to the anticipated gain. Again, this analysis reduces to an intensive factual inquiry that the ICC would have to undertake. At a minimum, attacks on dual-use type facilities would probably be more vulnerable

¹²⁸ *Id.* at Art. 8(2)(i).

¹²⁹ *Id.* at Art. 8(2)(ii).

¹³⁰ *Id.* at Art. 8(2)(iv).

¹³¹ See Operational Law Handbook, International & Operational Law Department, Judge Advocate General's School, United States Army, 5-3, 4 (2000) (The Handbook defines the principle of military necessity as that "principle which justifies those measures not forbidden by international law that are indispensable for securing the complete submission of the enemy as soon as possible." The Handbook also references the principle of

under ICC scrutiny and could involve the very second-guessing of American military targeting policy that the United States would like to avoid.

In addition to arguing the necessity and proportionality of the attack, the United States could defend its decision on grounds that the attack was not “committed as part of a plan or policy or as part of a large-scale commission of such crimes. . . .”¹³² Again, as considered in the Sudan hypothetical, it is unclear from the disjunctive nature of this clause the extent to which its language protects individual military members from prosecution for isolated acts. Furthermore, as discussed in the case of crimes against humanity, the protection of higher military commanders is suspect. Additionally, the United States may assert that the Kosovo bombings were part of a humanitarian intervention rather than an international armed conflict, thus rendering the provisions of Article 8 inapplicable.¹³³ The success of such an argument is uncertain.

Finally, NATO’s use of force in Kosovo under the auspices of humanitarian intervention creates a unique context in which to analyze Serbia’s hypothetical charge of aggression against the United States. To reiterate, Option Two of the Draft Statute provides that the act of bombing another country conforms to the type of action that constitutes aggression.¹³⁴ Additionally, as some commentators have asserted, bombing a country in the name of humanitarian intervention is not consistent with the act of self-defense.¹³⁵ For example, as American pilots bombed

proportionality as the “anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.”)

¹³² See Rome Statute, *supra* note 2, Art. 8(1).

¹³³ See *id.* at Art. 8(b).

¹³⁴ See Draft Statute, *supra* note 110, Option 2(1).

¹³⁵ See David, *supra* note 10, at 396.

targets in Kosovo, they were not acting in response to attacks on the United States. Rather, they attempted to stop the ongoing atrocities being committed in former Yugoslavia. Hence, a self-defense argument is inapplicable. Therefore, the question is whether the Draft Statute contains a basis for providing protection from the charge of aggression for nations that use force to pursue humanitarian objectives.

Whether or not the Draft Statute provides such protection to forces conducting humanitarian operations may hinge on the interpretation of the following language in the Draft Statute: “in contravention to the Charter of the United Nations.”¹³⁶ That is, should the NATO bombing of former Yugoslavia be read as consistent or inconsistent with the United Nations Charter? Or, as Ruth Wedgwood, professor of law at Yale University, posits, “Is the use of force for humanitarian necessity ever permitted by the United Nations Charter and international law, where it is not authorized by an affirmative vote of the Security Council?”¹³⁷ Indeed, the humanitarian intervention in Kosovo was not the result of a United Nations resolution, as Russia was sure to vote against the NATO operation.¹³⁸ However, the Security Council rejected a proposal by Russia, Belarus, and India to condemn the NATO operation as a violation of Articles 2(4), 24, and 53 of the United Nations Charter.¹³⁹ Further, the Security Council seemed to give tacit approval to the NATO operation by supporting an armed presence in Kosovo following the bombing campaign, for “it is implausible that the Council would ratify the results of an allied military campaign if it considered the

¹³⁶ Draft Statute, *supra* note 110, Option 2(1).

¹³⁷ Wedgwood, *supra* note 116, at 833.

¹³⁸ *See id.* at 831.

¹³⁹ *See id.*

means wholly illicit or tantamount to aggression.”¹⁴⁰ Wedgwood further suggests that the NATO action “may mark the end of Security Council classicism—the common belief that all necessary and legitimate uses of force outside the Council’s decision can necessarily be accommodated within the paradigm of interstate self defense.”¹⁴¹

There is no consensus on the legal justification for the use of military force in the context of humanitarian intervention. The Kosovo action could represent the emergence of an exception, in addition to self-defense, that does not require Security Council authorization. However, perhaps the more relevant question is how the ICC will interpret such actions. Since there is no requirement that there be a Security Council determination of aggression before the ICC could consider a charge of aggression, the ICC may have wide discretion to prosecute aggression in this ambiguous area of international law. Therefore, members of the United States armed forces could be called before the ICC for actions they take on a humanitarian mission.¹⁴²

This concern becomes more real after considering complaints filed with the ICTY against NATO. The ICTY prosecutor established a committee to review the various complaints against NATO action to determine whether a formal inquiry was warranted.¹⁴³ The allegations varied, ranging from the possible illegality of the entire operation, to NATO illegally targeting or causing excessive damage to civilians in violation of the rule of

¹⁴⁰ *Id.* at 830.

¹⁴¹ *Id.* at 828.

¹⁴² See David, *supra* note 10, at 396.

¹⁴³ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Jun. 13, 2000 (available at [http: www.un.org/icty/pressreal/nato0613.htm](http://www.un.org/icty/pressreal/nato0613.htm)) (visited Jan. 15, 2001) [hereinafter Final Report].

proportionality.¹⁴⁴ The Serbian Government, a Russian Parliamentary Commission, Amnesty International, and other groups filed documentation supporting the allegations.¹⁴⁵ The tribunal's chief prosecutor, Carla Del Ponte followed the recommendations of the committee and determined that a formal investigation into NATO actions was not merited.¹⁴⁶ However, some believe that the very fact that the prosecutor chose to review the allegations provides "a virtual road map to the future role of NGOs in pressuring and cajoling future national and international prosecutors."¹⁴⁷ Such ICC detractors fear that human rights NGOs may exert too much influence over the ICC prosecutor, making frivolous prosecutions aimed at legitimate military operations more likely.¹⁴⁸

Such concern is certainly appropriate when dealing with the review of military operations where the principles of proportionality and military necessity are often difficult to apply. As the ICTY committee reviewing NATO operations indicated when addressing the principle of proportionality, "One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective."¹⁴⁹ To be sure, inquiries into NATO action in Kosovo may not have concluded. The committee report included a section recommending against further investigation into the use of depleted uranium ammunition by NATO aircraft as a valid basis for a claim.¹⁵⁰

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ Barbara Crossette, *U.N. War Crimes Prosecutor Declines to Investigate NATO*, The New York Times, June 3, 2000, at A4.

¹⁴⁷ *The International Criminal Court: Recent Developments Hearing Before the Comm. on International Relations United States House of Representatives*, 106th Cong. (2000) (statement of John R. Bolton, Senior Vice President of the American Enterprise Institute) [hereinafter *House Committee Hearings*].

¹⁴⁸ *See id.*

¹⁴⁹ Final Report, *supra* note 143, at para. 48.

¹⁵⁰ *See id.*

However Prosecutor Del Ponte indicated more recently that NATO “could face a criminal investigation into the use by its forces of depleted uranium ammunition.”¹⁵¹ Del Ponte indicated that new facts were being gathered that could lead to a renewed investigation.¹⁵²

C. Analysis

The examination of hypothetical charges against the United States before the ICC highlights the reality that, while the Rome Statute has mechanisms that provide some safeguards to protect American servicemembers from actions being brought against them in the ICC, there is a strong possibility that American personnel could be prosecuted for carrying out actions authorized by the National Command Authority of the United States. The vulnerability appears particularly acute in the areas discussed above—the response to a terrorist attack that was justified as anticipatory self defense and participation in humanitarian operations involving the use of force. The legitimacy of these actions is not well settled in international law, and hence it is not clear how the ICC would decide such perplexing issues.

Professor David suggests that American servicemembers would face the risk of ICC scrutiny on the issue of aggression when the United States acts unilaterally without broad international support or the backing of the United Nations, and he suggests that such risk is appropriate.¹⁵³ He argues that without a United Nations mandate,

¹⁵¹ Kim Sengupta, *NATO Faces Inquiry Into Uranium ‘War Crimes’*, The Independent (London). January 15, 2001, at 2.

¹⁵² See *id.*

¹⁵³ See David, *supra* note 10, at 406.

American forces should be held accountable to the same standards as other nations.¹⁵⁴ The fact that the United States is engaged abroad bears little relevance as servicemembers will receive adequate protection when operating under a broad international mandate, but are more likely to be subject to ICC scrutiny when involved in unilateral uses of force. In this respect, Professor David views the ICC as a legitimate check on American conduct and not a tool for political misuse, since the ICC will weed out malicious claims promptly.¹⁵⁵ He admits that the United States may be unfairly exposed to risk of liability while participating in humanitarian missions, but argues that the response to such uncertainty should be potential liability over no liability.¹⁵⁶

However, supporters of the American position fear that the ICC has the potential for “political mischief.”¹⁵⁷ Opponents of the ICC envision nations seeking to influence American foreign policy by bringing actions in the ICC against American leaders responsible for making and carrying out policies.¹⁵⁸ Filled with the emotions that arise during the use of armed force, a nation that objects to an American use of force but is unable to stop it may seek solace in objecting to how military personnel implemented such force.¹⁵⁹ Additionally, as Ambassador Sheffer has pointed out, the reality of increased political risk of prosecution for American soldiers deployed abroad will curb American involvement in critical peacekeeping and humanitarian missions around the world.¹⁶⁰

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* at 407.

¹⁵⁶ *See id.*

¹⁵⁷ Michael F. Lohr & William K. Lietzau, *One Road Away From Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33 (1998/1999).

¹⁵⁸ *See id.* at 39.

¹⁵⁹ *See id.*

¹⁶⁰ *See Scheffer, supra* note 4, at 18.

Perhaps the larger underlying issue driving American concern is that the creation of the ICC marks a blow to the preeminent authority of the United Nations Security Council in maintaining international peace and order. Professor David explains that the United States apparent willingness to set aside its objections to the ICC if the Rome Statute includes a provision that requires Security Council approval of ICC jurisdiction “suggests a sinister motive.”¹⁶¹ That is, for the United States, such a provision embodies a basic refusal to be held accountable to a superior authority.¹⁶² But supporters of American objections to the ICC suggest that an end run around the authority of the Security Council through the creation of an independent ICC is inappropriate, arguing that “coercive authority over extraterritorial policies and activities of a state is the clear realm of the Security Council.”¹⁶³ The Security Council has shaped the world order for over 50 years, reflecting *realpolitik* imperatives.¹⁶⁴ Of course, critics of the Security Council would argue that it has been ineffective in responding to many of the crimes outlined in the Rome Statute, often because of disagreement between the five permanent members. Assuming that, in some cases, the structure of the Security Council has stymied adequate international responses to crimes against humanity, war crimes, or aggression, the question remains whether the ICC, as currently structured, provides the solution.

The United States, as the world’s only remaining superpower, is called upon to employ military force throughout the world more than any other nation.¹⁶⁵ Therefore, an independent ICC poses unique risks for the

¹⁶¹ See David, *supra* note 10, at 407.

¹⁶² See *id.*

¹⁶³ Lohr & Lietzau, *supra* note 157, at 47.

¹⁶⁴ See *id.*

¹⁶⁵ Scheffer, *supra* note 4, at 18.

United States, inasmuch as the frequency of American actions around the world brings a greater chance of Americans being subject to the scrutiny of the ICC. Recognizing this reality, the ICC has the potential to impinge upon the sovereignty of the United States more than any other nation. Whether or not such exposure is warranted will depend largely upon the ICC's ability to render fair decisions based on international law. To a certain extent, the American perspective of "fairness" relates to its ability to directly voice its opinion on issues of international security through its position as a permanent member of the Security Council. An independent ICC represents a significant dilution of the United States ability to exercise its influence over such matters. While a shift away from concentrated power in the hands of a few nations over international criminal adjudication may be appropriate, the management of that shift is important, and the manner and speed with which it is carried out should not be too abrupt.

The signing of the Rome Statute by the United States may symbolize its recognition that the ICC will come into being with or without American backing. Therefore, the key for the United States is to negotiate an agenda for the evolution of the ICC that is consistent with American interests. The principal challenges include addressing the ICC's purported jurisdiction over nonparty states and the ability of the United States to observe the operation of the ICC prior to having citizens of the United States subject to the ICC's jurisdiction. Some members of Congress have proposed a bill that would significantly limit American support for the effectiveness of the ICC. Alternatively, other members of Congress have proposed a bill that seeks to protect American citizens from ICC prosecution, but allow the United States to support the ICC. Negotiators for the United States from the Clinton Administration continued to push for concessions that would allow the United States to provide support to the ICC,

whether the United States becomes a party to the agreement or not. The following section will review the legislative proposals and American efforts to negotiate an acceptable agreement that would enable American support.

PART IV. AMERICAN SERVICEMEMBERS' PROTECTION ACT

Senator Jesse Helms, former Chairman of the Senate Foreign Relations Committee, made the following statement to committee members in regard to the proposed American Servicemembers' Protection Act (ASPA): "[i]f other nations are going to insist on placing Americans under the ICC's jurisdiction against their will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure our men and women in uniform are protected."¹⁶⁶ Responding to such concern, Republican members of both the United States House and Senate proposed identical versions of the Act in 2000 that sought to preclude American servicemembers from being subject to ICC jurisdiction.¹⁶⁷

The ASPA has several parts, including the following sections: (1) prohibition on cooperation with the ICC, (2) restrictions on American participation in certain United Nations peacekeeping operations, (3) prohibition on transfer of classified national security information to the ICC, (4) prohibition of American military assistance to parties to the ICC, (5) authority to free American military personnel held captive by ICC, (6) status of forces

¹⁶⁶ *Senate Foreign Relations Committee Hearings*, *supra* note 30 (statement of Senator Jesse Helms, Chairman of Comm. on Foreign Relations).

¹⁶⁷ American Servicemembers' Protection Act, S. 2726, 106th Cong. (2000); *See also* American Servicemembers' Protection Act, H.R. 4654, 106th Cong. (2000).

agreements, and (7) alliance command arrangements.¹⁶⁸ In addition, the ASPA contains language indicating that the Rome Statute fails to provide individuals with adequate procedural protections guaranteed by the United States Constitution.¹⁶⁹ Subsequent discussion will briefly address the Constitutional objection contained in the ASPA as well as the seven above-mentioned provisions of the ASPA.

A. A Review of the ASPA

Section 2 of the ASPA contains several Congressional findings, one of which asserts that the Rome Statute would deny Americans rights guaranteed in the Bill of Rights, including “the right to trial by jury, the right not to be compelled to provide self incriminating testimony, and the right to confront and cross examine all witnesses for the prosecution.”¹⁷⁰ The proposed legislation mandates that the United States must protect American servicemembers against prosecutions under “procedures that deny them their constitutional rights.”¹⁷¹

Moreover, the ASPA seeks to prohibit cooperation with the ICC in several ways. Section 4 of the ASPA indicates that United States Government entities are precluded from complying with requests for cooperation from the ICC.¹⁷² Specifically, the proposed legislation prohibits cooperation with Article 89 of the Rome Statute, relating to the arrest, extradition, and transit of suspects; Article 92, dealing with the provisional arrests; and Article 93, concerning other forms of cooperation such as gathering evidence, executing searches and seizures, and seizing

¹⁶⁸ American Servicemembers’ Protection Act, S. 2726, 106th Cong. (2000).

¹⁶⁹ *See id.* at § 2.

¹⁷⁰ *See id.* at § 2(6).

¹⁷¹ *See id.* at § 2(7).

¹⁷² *See id.* at § 4.

property and instrumentalities of crimes.¹⁷³ Additionally, Section 4 restricts assistance to the ICC through mutual legal assistance treaties and prohibits agents of the ICC from carrying out investigations in the United States or any territory subject to American jurisdiction.¹⁷⁴

Section 5 of the ASPA attempts to restrict American participation in United Nations peacekeeping operations.¹⁷⁵ The section precludes American military members from participating in such operations unless the President certifies that American military personnel are not at risk of prosecution by the ICC.¹⁷⁶ It provides three ways in which the President can achieve such a certification. First, the United Nations Security Council can exempt American personnel who participate in the operation from prosecution.¹⁷⁷ Second, the ASPA provides for appropriate protection if the countries where the operations take place are either not parties to the ICC or entered into an agreement consistent with Article 98 of the Rome Statute, preventing ICC jurisdiction.¹⁷⁸ Finally, the ASPA permits certification of adequate protection if the President takes other “appropriate steps to guarantee that United States military personnel participating in the peacekeeping operation will not be prosecuted by the International

¹⁷³ See American Servicemembers’ Protection Act, S. 2726, 106th Cong. (2000); See also Rome Statute, *supra* note 2, Art. 89, 92, 93.

¹⁷⁴ American Servicemembers’ Protection Act, S. 2726, 106th Cong. (2000); See also American Servicemembers’ Protection Act, H.R. 4654, 106th Cong. (2000).

¹⁷⁵ See *id.* at § 5(b).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at § 5(c)(1).

¹⁷⁸ See American Servicemembers’ Protection Act, S. 2726, 106th Cong. § 5(c)(2) (2000); See also Rome Statute, *supra* note 1, Art. 98.

Criminal Court for actions undertaken by such personnel in connection with the operation.”¹⁷⁹ The proposed legislation also contains a section that prohibits the transfer of classified national security information to the ICC.¹⁸⁰ The ASPA forbids direct transfers and indirect transfers via the United Nations or a third country unless the United States is assured in writing that the information will not go to the ICC.¹⁸¹

Section 7 of the ASPA proscribes United States military assistance to countries that are parties to the ICC.¹⁸² However, there are exceptions. First, the President may waive the prohibition if the United States and the other country involved have reached an agreement consistent with Article 98 of the Rome Statute.¹⁸³ Second, NATO countries or major non-NATO allies¹⁸⁴ of the United States, such as Israel and Japan, are exempt from the freeze on military assistance.¹⁸⁵

Section 8 authorizes the President to “use all means necessary and appropriate to bring about the release from captivity of any person. . . who is being detained or imprisoned. . . by or on behalf of the International Criminal Court.”¹⁸⁶ Persons who fall under this provision include United States military members, government officials and

¹⁷⁹ American Servicemembers’ Protection Act, S. 2726, 106th Cong. § 5(c)(3) (2000); *See also* American Servicemembers’ Protection Act, H.R. 4654, 106th Cong. § 5(c)(3) (2000).

¹⁸⁰ *See id.* at § 6.

¹⁸¹ *See id.*

¹⁸² *See id.* at § 7.

¹⁸³ *See id.* at § 7(b).

¹⁸⁴ *See id.* at § 12 (defining “major non-NATO ally” as a country so designated by § 517 of the Foreign Assistance Act of 1961).

¹⁸⁵ *See id.* at § 7(d).

¹⁸⁶ *Id.* at § 8(a).

employees, and personnel of other allied countries that are not parties to the ICC if assistance is requested by the particular government.¹⁸⁷ Further, the individuals must be detained or imprisoned for official actions.¹⁸⁸

Section 9 of the ASPA requires the President to evaluate current Status of Forces Agreements and to report to Congress regarding the level of protection from extradition such agreements provide under Article 98 of the Rome Statute.¹⁸⁹ Section 9 further requires that the President submit a plan to Congress setting forth a strategy to amend existing agreements or negotiate new ones in order to maximize protection for American personnel.¹⁹⁰

Finally, Section 10 deals with alliance command arrangements. This section requires the President to evaluate the extent to which American servicemembers will be exposed to a greater risk of ICC prosecution as a result of being placed under the command of foreign military officers who are subject to the ICC.¹⁹¹ Lastly, the section requires the President to submit a plan to Congress that describes how command and control arrangements will be modified to mitigate the risk to American personnel.¹⁹²

Evidently, the ASPA is an attempt to solidify American opposition to the ICC and send a clear signal to other countries that are considering ratification of the treaty. The message to other nations is that American military aid and support, absent a waiver or exemption, will be contingent on whether that country has decided to become a

¹⁸⁷ *See id.* at § 8(b).

¹⁸⁸ *See id.*

¹⁸⁹ *See* American Servicemembers' Protection Act, S. 2726, 106th Cong. § 5(c)(2) (2000); *See also* Rome Statute, *supra* note 2, Art. 98.

¹⁹⁰ American Servicemembers' Protection Act, S. 2726, 106th Cong. § 9(b) (2000); *See also* American Servicemembers' Protection Act, H.R. 4654, 106th Cong. § 9(b) (2000).

¹⁹¹ *See id.* at § 10(a).

¹⁹² *See id.* at § 10(b).

party to the ICC. Again, the potential threat of American servicemembers being subject to the jurisdiction of the ICC is real. Only time will tell whether or not countries will successfully use the ICC to advance suspect political motives in influencing American foreign policy. The remaining issue is whether or not the ASPA represents a balanced and appropriate response to the creation of the ICC.

At its outset, the proposed bill cites concern over the denial of adequate procedural protections in the Rome Statute. Specifically, the ASPA points to the lack of a right to a jury trial, the right against self-incrimination, and the right of confrontation and cross-examination.¹⁹³ Monroe Leigh, testifying before Congress on behalf of the American Bar Association, claimed that due process concerns are misplaced.¹⁹⁴ First, Leigh explained that the Fifth Amendment right to a jury trial explicitly excludes military operating abroad.¹⁹⁵ Next, Leigh asserted that the Sixth Amendment does not contemplate an “extraterritorial effect in foreign countries,”¹⁹⁶ and clarified that individuals are entitled to a jury trial only ‘in the State and district wherein the offense shall have been committed.’¹⁹⁷ As to the right of confrontation and cross-examination, Leigh reported asserted Article 67(1)(e) of the Rome Statute expressly provides such protection.¹⁹⁸ Likewise, according to Leigh, the Rome Statute provides for a right against self-

¹⁹³ See *id.* at § 2(6).

¹⁹⁴ See *House Committee Hearings*, *supra* note 147 (statement of Monroe Leigh of the American Bar Association).

¹⁹⁵ See *House Committee Hearings*, *supra* note 147 (statement of Monroe Leigh of the American Bar Association); See also U.S. Const. Amend. V.

¹⁹⁶ *House Committee Hearings*, *supra* note 147 (statement of Monroe Leigh of the American Bar Association).

¹⁹⁷ U.S. Const. Amend. VI.

¹⁹⁸ *House Committee Hearings*, *supra* note 147 (statement of Monroe Leigh of the American Bar Association); See also Rome Statute, *supra* note 2, Art. 67(1)(e) (entitling accused “to examine or have examined, the

incrimination in Article 67(1)(g).¹⁹⁹ Ambassador Scheffer has cited Leigh's constitutional analysis with approval,²⁰⁰ and has gone on to criticize numerous aspects of the proposed legislation.

B. Ambassador Scheffer's Objections to the ASPA

The chief American negotiator for the ICC, Ambassador Scheffer, opposes the ASPA on the grounds that the proposed legislation will not only negatively impact ongoing negotiations regarding supplemental agreements that the United States is trying to achieve, but that it will also unduly infringe on the President's constitutional authority to conduct foreign relations in his role as Commander-in-Chief.²⁰¹ Ambassador Scheffer further argues that the proposed bill "will worsen our negotiating position at the very moment when we stand the best chance of securing agreement with other governments to protect our soldiers and governmental officials and continue our support for international justice."²⁰²

Ambassador Scheffer is particularly critical of Sections 4-10 of the ASPA. As to Section 4, Scheffer argues that the President already has the authority to prohibit cooperation with the ICC and that this choice should

witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.").

¹⁹⁹ *House Committee Hearings*, *supra* note 147 (statement of Monroe Leigh of the American Bar Association); *See also* Rome Statute, *supra* note 2, Art. 67(1)(g) (entitling accused "not to be compelled to testify or to confess guilt and to remain silent, without such silence being consideration in the determination of guilt or innocence.").

²⁰⁰ *See* Ambassador David Scheffer, Statement Before the Congressional Human Rights Caucus (Sep. 15, 2000).

²⁰¹ *See House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues).

²⁰² *See id.*

remain subject to executive discretion.²⁰³ Situations may arise where cooperation with the ICC would be in the national interest of the United States, such as an investigation and prosecution of a rogue leader like Saddam Hussein.²⁰⁴ Further, the Department of Justice has expressed concern that Section 4 “may impair the President’s power as Commander-in-Chief” by limiting American cooperation such as military or law enforcement assistance.²⁰⁵ The Department of Justice has advised that, if the ICC functions as an international forum, the ASPA appears to preclude the President from communicating with the forum, thereby impermissibly intruding on the “President’s plenary and exclusive authority over diplomatic communications.”²⁰⁶ Finally, Scheffer stresses that Section 4’s prohibition on cooperation cripples the American delegation’s ability to negotiate for adequate protection for American military personnel and officials. He states, “I must be able to offer, in exchange for the protection that we are seeking, the ultimate cooperation of the United States with the ICC when it serves our national interests while our country is a nonparty to the ICC Treaty.”²⁰⁷

Scheffer also criticizes Section 5 of the ASPA. The Ambassador again argues that the proposed legislation unconstitutionally infringes on the President’s power as Commander-in-Chief, and potentially prevents the President from authorizing the participation of American forces in peacekeeping operations, even when he has deemed such

²⁰³ See *House Committee Hearings*, supra note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues); See also American Servicemembers’ Protection Act, H.R. 4654, 106th Cong. § 4 (2000).

²⁰⁴ See *House Committee Hearings*, supra note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

participation necessary for national security or the protection of American personnel.²⁰⁸ Scheffer states that this provision “ignores the President’s responsibility to weigh national security considerations in deciding when and how to deploy American military personnel under a wide and unpredictable range of contingencies.”²⁰⁹

With respect to Section 6 of the bill, Scheffer points out that Articles 72 and 73 of the Rome Statute already provide that parties and nonparties alike have complete control over the transmission of classified national security information to the ICC.²¹⁰ Hence, the provision is not necessary.²¹¹

As previously discussed, Section 7 precludes American military assistance to foreign governments that are parties to the ICC, with the exception of NATO allies, major non-NATO allies, or countries that have entered agreements with the United States consistent with Article 98 of the Rome Statute.²¹² Scheffer suggests that this provision unnecessarily holds American military assistance hostage to ICC membership, regardless of the national interests of the United States.²¹³ Constitutional difficulties may also arise if the President needs to provide military

²⁰⁸ See *House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues); See also American Servicemembers’ Protection Act, H.R. 4654, 106th Cong. § 5 (2000).

²⁰⁹ *House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues).

²¹⁰ See *House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues); See also Rome Statute, *supra* note 2, Art. 72, 73.

²¹¹ See *House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues).

²¹² See American Servicemembers’ Protection Act, H.R. 4654, 106th Cong. § 7 (2000).

²¹³ See *House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues).

assistance in an emergency situation to protect American forces operating in a friendly country where the Section 7 exemption does not apply and seeking a waiver is impracticable.²¹⁴

Furthermore, Scheffer criticizes Section 8 as an “alarmist provision that only complicates our ability to negotiate our common objective of protection from prosecution.”²¹⁵ The section contemplates an attack on one of the NATO allies, The Netherlands, in order to emancipate American personnel detained by the ICC.²¹⁶ The President already possesses the requisite power to protect American personnel around the world.²¹⁷

Section 9, which requires the President to evaluate the degree of protection Status of Forces Agreements provide and to seek necessary amendments to enhance protection, is also potentially problematic, according to Scheffer. He points out that by reopening negotiations on Status of Forces Agreements, countries may seek to renegotiate a number of other agreement provisions.²¹⁸

Finally, Ambassador Scheffer explains that Section 10 “needlessly subjects our alliance command arrangements to factors pertaining to the ICC Treaty. . . suggest[ing] our national security interests will be held hostage to the ICC Treaty.”²¹⁹ Scheffer points out that American servicemembers will experience the same risks once operating in the territory of an ICC party, regardless of command relationships.²²⁰ The degree of risk varies in

²¹⁴ *See id.*

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *Id.*

²²⁰ *See id.*

relation to the Status of Forces Agreements or similar agreements, rather than command relationships.²²¹ Scheffer opines that Sections 9 and 10 both may unconstitutionally infringe on the executive branch's power to enter into negotiations with foreign governments and to determine the content of such agreements.²²² If the language contemplates a mandate on the President to negotiate modifications to certain international agreements, the legislation intrudes on the President's power to "determine the form and manner in which the United States will maintain foreign relations."²²³

C. Status of the ASPA

While the proposed legislation remained dormant in 2000, proponents introduced a revised version—the American Servicemembers' Protection Act of 2001 (2001 Act)—in the House and Senate in May 2001.²²⁴ The House approved the 2001 Act as an amendment to the Foreign Relations Authorization Act of 2001, which passed the House on May 16, 2001.²²⁵ The following day, the bill was referred to the Senate Committee on Foreign Relations.²²⁶

The 2001 Act is largely identical to the 2000 version and contains few substantive differences. The language of Section 3 of the 2001 version differs however, in that it provides for the possibility of a Presidential

²²¹ *See id.*

²²² *See id.*

²²³ *Id.*

²²⁴ *See* American Servicemembers' Protection Act, H.R. 1794, 107th Cong. (2001); *See also* American Servicemembers' Protection Act, S. 857, 107th Cong. (2001).

²²⁵ *See* Foreign Relations Authorization Act, H.R. 1646, 107th Cong. (2001).

²²⁶ 147 Cong. Rec. S. 5116 (2001).

waiver of the requirements in certain other sections. The 2001 provision gives the President the authority to waive Sections 5 and 7 (restrictions on participation in peacekeeping operations and military assistance to ICC parties, respectively) for one year if certain criteria are met.²²⁷ The President must notify the House Committee on International Relations and the Senate Foreign Relations Committee of his intention to invoke Section 3 authority, and he must notify the two committees that the ICC has entered an agreement that prevents ICC jurisdiction over certain protected persons to ensure that such persons will not be “arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court.”²²⁸ The President is authorized to extend this waiver for another year if the above-mentioned requirements remain satisfied.²²⁹

Additionally, the 2001 version of Section 3 includes a provision for the President to waive Sections 4 and 6 (prohibition on cooperation with the ICC and prohibition on transfer of classified information, respectively) if the President notifies Congress and reports that a waiver for Sections 5 and 7 is in effect.²³⁰ The President must report a reason to believe an individual has committed a crime subject to the ICC’s investigation or prosecution, that ICC prosecution is in the national interest of the United States, and that the protected persons will remain exempt from the ICC’s reach.²³¹

²²⁷ See American Servicemembers’ Protection Act, H.R. 1794, 107th Cong. § 3 (2001);

²²⁸ *Id.*

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See *id.*

Accordingly, the waiver provision in Section 3 gives the President another potential avenue for cooperation with the ICC or ICC parties. However, the opportunity may prove more theoretical than real since the threshold requirement of securing an exemption agreement from the ICC seems unlikely based on previous efforts by United States negotiators. For example, delegates rejected a 1998 American proposal to modify Article 12 of the Rome Statute to require consent to ICC jurisdiction from both the state where the offense occurred and the state of the offender's domicile.²³² More likely, the United States will be able to reach Article 98 agreements with other countries under the proposed legislation that would allow it to participate in peacekeeping operations or give military aid to other countries.

One area where the President appears to have more flexibility under the 2001 Act is under Section 7. Section 7 authorizes the President to waive the prohibition against providing military assistance to ICC parties for periods up to one year if the President decides such support is "vital to the national interest of the United States."²³³ The 2000 version required an Article 98 agreement between the United States and corresponding country before the President could waive the prohibition.²³⁴ The 2001 Act still requires an Article 98 agreement for a *permanent* waiver.²³⁵

²³² Ruth Wedgwood, *The United States and the International Criminal Court: The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, at 201 (2001).

²³³ American Servicemembers' Protection Act, H.R. 1794, 107th Cong. § 7 (2001).

²³⁴ See American Servicemembers' Protection Act, H.R. 4654, 106th Cong. § 7 (2000).

²³⁵ See American Servicemembers' Protection Act, H.R. 1794, 107th Cong. § 7 (2001).

One final difference worth noting is the absence of the Status of Forces Agreement Section from the 2001 Act. The review of current Status of Forces Agreements to determine the degree of protection under Article 98 seems like a logical and important step in attempting to secure protection for American military members. It is unclear why bill proponents deleted this provision from the revised legislation.

Legislators who favor the Act and Ambassador Scheffer purport to be striving for the same goal—to protect American personnel from the jurisdictional reach of the ICC so long as the United States is not a party to the Rome Statute. Before commenting further on the appropriateness of the ASPA as a response to the ICC, the discussion must consider an alternative legislative proposal.

D. Alternative Bill Proposed – American Citizens’ Protection and War Criminal Prosecution Act

In August of 2001, Representative William Delahunt and Senator Christopher Dodd introduced the American Citizens’ Protection and War Criminal Prosecution Act of 2001 (ACPA).²³⁶ The legislation seeks to protect the due process rights of American citizens “before foreign tribunals, including the International Criminal Court....”²³⁷ The proposed legislation attempts to protect American citizens from ICC prosecution, but also requires that the United States remain engaged in ICC negotiations.

The ACPA strives to afford Americans protection from ICC prosecution in two ways. First, the ACPA prohibits extradition to the ICC if the United States is investigating or prosecuting the crime, or determines there is

²³⁶ See American Citizens’ Protection and War Criminal Prosecution Act, H.R. 2699, 107th Cong. (2001); See also American Citizens’ Protection and War Criminal Prosecution Act, S. 1296, 107th Cong. (2001).

no reasonable basis to proceed, or if the person was acquitted.²³⁸ Second, the ACPA requires the United States to investigate any crime that an American citizen is charged with under the Rome Statute, “unless the President determines that it is not in the national interest to do so.”²³⁹ If, despite these protections, the ICC is able to bring an American citizen before it, the legislation requires that the President ensure the individual receives due process protections and legal representation.²⁴⁰

In contrast to the ASPA, the ACPA supports continued engagement with ICC negotiations²⁴¹ and allows the United States to assist the ICC with prosecutions.²⁴² The ACPA specifies the need to participate in negotiations and serve as an observer in the Assembly of State Parties to influence the elements of crimes, the procedural and evidentiary rules, and make certain the ICC fairly applies them.²⁴³ The ACPA also states continued engagement should allow the United States to advocate a definition of aggression consistent with international law and American interests.²⁴⁴ Furthermore, the ACPA authorizes the United States to assist the ICC when the President determines such support “would serve important United States interests.”²⁴⁵

²³⁷ See American Citizens’ Protection and War Criminal Prosecution Act, H.R. 2699, 107th Cong. (2001).

²³⁸ See *id.* at § 5.

²³⁹ *Id.*

²⁴⁰ See *id.*

²⁴¹ See *id.* at § 4.

²⁴² See *id.* at § 7.

²⁴³ See *id.* at § 4.

²⁴⁴ See *id.*

²⁴⁵ See *id.* at § 7.

The ACPA also contains some important reporting requirements. First, the bill requires the Attorney General, Secretary of Defense, and Secretary of State to jointly review and report findings on the extent to which the crimes listed in the Rome Statute can be investigated and prosecuted under American law.²⁴⁶ The legislation also compels the President to compare the due process protections contained in the Rome Statute with protections found in Status of Forces Agreements, extradition treaties and other international agreements and report those findings to Congress.²⁴⁷ The President also must report on ways alliance command arrangements can be restructured to reduce any additional risk to United States military personnel.²⁴⁸

The ACPA responds to many of the criticisms of the ASPA. Unlike the ASPA, the ACPA does not restrain the President in his role as Commander-in-Chief of the military. The ACPA does not preclude American participation in peacekeeping operations or limit military aid to foreign countries based on the relevant countries' status as an ICC supporter. Additionally, in contrast to the ASPA, the ACPA encourages ongoing dialogue between the ICC and United States and contemplates American support to the ICC consistent with national interests. The ACPA also seeks to ensure American laws allow the United States to take full advantage of the Rome Statute's complementarity principle and that international agreements also provide maximum protection to United States citizens.

²⁴⁶ *See id.* at § 5.

²⁴⁷ *See id.* at § 6.

²⁴⁸ *See id.* at § 9.

Still, even with the protections provided by the ACPA, American servicemembers could find themselves the subjects of an ICC prosecution where the United States determines a domestic investigation is unwarranted and an international agreement fails to prevent the ICC from exercising jurisdiction. Therefore, one must consider the extent to which further international agreements could provide the desired protection for American military members. The following section considers previous American attempts to reach such an agreement.

E. United States Seeks a Supplementary Agreement

In June of 2000, the Department of State issued a statement indicating that the United States had launched an initiative aimed at addressing its fundamental concern over the ICC jurisdictional provision.²⁴⁹ According to the statement, the proposal sought to preclude the ICC from exercising jurisdiction over nationals of nonparty states involved in official actions so long as the nations were responsible.²⁵⁰ The statement explained that the proposal would be in the form of an international agreement between the United Nations and the ICC.²⁵¹ Several months later, in an address to the Congressional Human Rights Caucus, Ambassador Scheffer spoke of the need to balance international peace efforts and responses to humanitarian tragedies against attempts to establish international justice.²⁵² He suggested that the American initiative would allow responsible international nonparties that respected

²⁴⁹ Phillip T. Reeker, Acting Spokesman U.S. Department of State, U.S. Initiative on the International Criminal Court, (Jun. 13, 2000).

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *See Scheffer, supra* note 200.

the principle of complementarity to invoke a “privilege of non-surrender of its nationals to the Court.”²⁵³ In essence, the proposal would seek to establish the necessary balance.

To ensure the effectiveness of the agreement between the United Nations and the ICC, the United States negotiated for the acceptance of a rule under Article 98 of the Rome Statute that requires the ICC to honor relevant international agreements before seeking custody over alleged criminals.²⁵⁴ A month later, in a statement to the Sixth Committee of the United Nations General Assembly, Scheffer stated that acceptance of such a provision would allow the United States to become a “good neighbor” to the ICC.²⁵⁵ He went on to warn that if an agreement could not be reached, the relationship between the United States and the ICC would be tenuous, and such lack of agreement would limit the ability of nonparty states, such as the United States, to participate in important humanitarian interventions.²⁵⁶

The challenge of obtaining the requisite support for an agreement that would allow the United States to be “a good neighbor” to the ICC is formidable. In testifying before Congress, Ambassador Scheffer estimated that the chances for success “could be 50-50 at this stage.”²⁵⁷ The finalized draft text of the Rules of Procedure and Evidence the Preparatory Commission adopted for the ICC includes Rule 195, which expands on Article 98 of the

²⁵³ *Id.*

²⁵⁴ See *Senate Foreign Relations Hearings*, *supra* note 30 (statement of Ruth Wedgwood, Professor of Law of Yale University).

²⁵⁵ Ambassador David Scheffer, Statement Before the Sixth Committee of the UN General Assembly, (Oct. 18, 2000)

²⁵⁶ See *id.*

²⁵⁷ See *House Committee Hearings*, *supra* note 147 (statement of David Scheffer, Ambassador-At-Large for War Crimes Issues).

Rome Statute.²⁵⁸ The rule prohibits the ICC from requesting the surrender of an individual “without the consent of a sending State if . . . such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to surrender of a person of that State to the Court.”²⁵⁹ Arguably, this provision contemplates not only agreements with other states, but also an agreement with international organizations such as the ICC and the United Nations. Apparently, the Rule lays the foundation for the effective implementation of an American proposal to limit the ICC’s ability to request the surrender of individuals by virtue of an agreement between the ICC and United Nations. However, the latest United States proposal regarding the agreement between the United Nations and the ICC appears to fall short of achieving an exemption for American servicemembers. Under the proposal, the ICC and the United Nations would agree to the following:

In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender of a

²⁵⁸ *Report of the Preparatory Commission for the International Criminal Court*, U.N. Preparatory Commission for the International Criminal Court, 5th Sess., Addendum 1, at 89, PCNICC/2000/1/Add.1 (2000).

²⁵⁹ *Id.*

suspect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality.²⁶⁰

Evidently, the proposal does little more than require the ICC to follow the complementarity provision already included in the Rome Statute. The proposed agreement does not preclude the ICC from exercising jurisdiction in any respect; it merely requires the ICC to comply with the complementarity provision in order to encourage support from countries for carrying out the goals of international peace and security. However, some Americans fear that the complementarity provision leaves the United States potentially vulnerable to prosecutions challenging legitimate exercises of military force. The complementarity provision likely will not apply to such situations, since the United States will not be inclined to conduct an investigation and thereby invoke the protections of Article 17.

F. Options for the United States

The determination whether or not the United States should support an international treaty typically involves a balancing of interests. The United States has an interest in bringing to justice those who commit war crimes, crimes against humanity, genocide, and aggression. Clearly, the United States has demonstrated such resolve by being an instrumental participant in the establishment of past criminal tribunals, ranging from Nuremberg, to former Yugoslavia and Rwanda. The establishment of a permanent court and a commitment to consistent and effective responses to violators of international norms is consistent with American interests. Furthermore, the United States has an interest in ensuring that American military members serving in foreign lands are not subject to arbitrary or

²⁶⁰ *Proceedings of the Preparatory Commission at Its Sixth Session*, U.N. Preparatory Commission for the International Criminal Court, 6th Sess., Annex II, at 10, PCNICC/L.4/Rev.1/Add.1 (referencing U.S. proposal

capricious trials that seek to change American foreign policy rather than to obtain justice. The United States is currently faced with making a decision as to whether or not it should support the creation and development of the ICC. Support for the American Servicemembers' Protection Act signals active opposition to the ICC. Alternatively, as the ICC evolves, the United States can remain engaged and work to ensure that American interests are represented to the greatest extent possible. The American Citizens' Protection and War Criminals Prosecution Act fosters such an approach.

The American Servicemembers' Protection Act is overly restrictive in limiting future American foreign policy initiatives based solely on ICC considerations. Situations may exist where the ICC acts consistently with American interests such that assistance to the ICC would be appropriate. For example, the ICC may seek to bring a dictator or leader of an oppressive regime to justice. In such a case, the United States should not be restricted from offering support to the ICC. Similarly, the decision whether or not to provide foreign military assistance to a country is complex and involves a number of policy considerations. A particular nation's disposition toward the ICC should not hold this decision hostage. The decision to engage in a United Nations' peacekeeping operation is equally complicated. There may be situations where the United State's senior leadership determines that involvement in an operation is warranted despite the risk of ICC prosecution. Again, the threat of potential ICC prosecution should not dictate American actions abroad. The United States should take the risk of prosecution into consideration, but the existence of such a risk should not be determinative in each case.

While the American Servicemembers' Protection Act is overly restrictive in its attempt to protect American servicemembers, the legislative goal is appropriate. The United States must strive to protect American servicemembers from ICC prosecution to the maximum extent possible until it is satisfied that the ICC has proven through practice to be a credible and just organization. The American Citizens' Protection and War Criminals Prosecution Act appears to provide for a better balance in this pursuit. Whether the United States can achieve the necessary degree of protection by negotiating an adequate provision in the context of an agreement between the United Nations and the ICC remains uncertain. The current proposal appears to fall short, but the United States must remain engaged in the process. It should endeavor to ensure that Status of Forces Agreements and other international agreements provide as much protection as possible to American servicemembers. Additionally, perhaps the United States could enter into ad hoc agreements with the United Nations that exempt American servicemembers participating in United Nations' peacekeeping operations from ICC jurisdiction.

Thus far, the ICC has received a cold reception from the Bush Administration. In August, Pierre-Richard Prosper, Scheffer's replacement as the Ambassador-at-Large for War Crimes Issues, indicated that the administration continues to oppose the ICC, although the administration has not announced a clear policy in response to the ICC yet.²⁶¹ Key officials in the Bush administration have also signaled their opposition. Prior to entering his current position, Secretary of Defense Donald Rumsfeld joined several other former foreign policy

²⁶¹ Norman Kempster, *The World; U.S. May Back Creation of Special Authority Tribunals; War Crimes: New Envoy Says Administration Remains Opposed to Plan for a Worldwide Court*, Los Angeles Times, August 2, 2001, at A4.

leaders in expressing support for the American Servicemembers' Protection Act.²⁶² Likewise, at his confirmation hearings, Secretary of State Colin Powell expressed reservations about the ICC, reiterating the administration's opposition to the ICC and indicating that ratification was unlikely.²⁶³ However, Powell recognized that the United States' signature of the Rome Statute entails certain obligations of good faith.²⁶⁴

Scheffer has criticized the current administration for taking a minimalist approach, claiming that the United States currently only maintains a small presence in ICC negotiations, which focuses primarily on the issue of aggression.²⁶⁵ Scheffer stresses that such a posture will allow important operating provisions of the ICC to come into effect without American participation.²⁶⁶ Whether the Bush administration actively opposes the ICC, supports limited participation in preparatory committee meetings, or advocates a more robust engagement in ICC negotiations remains unclear. Perhaps what is more certain is that the ICC will likely come into existence; American military members serving abroad could be put at risk; and, if the United States remains on the sidelines as the ICC develops, an adverse impact on American servicemembers and foreign policy interests becomes more of a reality.

²⁶² Wedgwood, *supra* note 232, at 196-197.

²⁶³ *Confirmation Hearing of General Colin Powell to be Secretary of State Before the Senate Comm. on Foreign Relations*, 107th Cong. (2001).

²⁶⁴ *See id.*

²⁶⁵ Scheffer, *supra* note 38, at 14.

²⁶⁶ *See id.*

CONCLUSION

The United States has a duty to protect the interests of its military members serving abroad. The establishment of the ICC could put Americans at risk insofar as they may be the subjects of unwarranted, political prosecutions. However, it is equally possible that American support could help the ICC develop into a competent and credible international institution. The United States should not seek to sound the death knell for the ICC just yet. It has lobbied successfully for many protections and checks and balances within the structure of the ICC. Therefore, while the United States should take steps to protect Americans from the jurisdiction of the ICC, it should not actively oppose the establishment of the ICC. The United States should remain engaged in negotiations that continue to shape the ICC, attempt to maximize protections for American servicemembers, and reserve judgment on the propriety and effectiveness of the institution until the ICC has been observed in action.